L. LIN WOOD, P.C.
TRIAL LAWYERS

G. TAYLOR WILSON
Direct Dial: (678) 365-4107
twilson@linwoodlaw.com

January 7, 2019

VIA ECF

Honorable Dora L. Irizarry
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *La Liberte vs. Reid*, Civil Action No. 18-5398
Plaintiff's Request for Rule 56(d) Discovery

Your Honor,

As referenced in my letter dated December 19, 2018, I write today pursuant to Your Honor's Individual Motion Practice and Rules and Local Rule 37.3(c) to request certain targeted discovery pursuant to Federal Rule of Civil Procedure 56(d) prior to the Court's hearing and ruling on Defendant Joy Reid's ("Reid") Motion to Dismiss the Action and Strike the Complaint filed pursuant to Rule 12(b)(6) and California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16 (the "Anti-SLAPP Motion"). Enclosed herewith as Exhibit A is my declaration setting forth in detail the discovery sought, the purpose of that discovery, and Plaintiff La Liberte's ("La Liberte") need for that discovery prior to the Court's hearing and ruling on the Anti-SLAPP Motion. In short, La Liberte seeks limited discovery solely on the issue of actual malice.[1]

Anti-SLAPP motions filed in federal court create extraordinary procedural issues for the parties and the courts. The scope, timing, and method of discovery are among those issues. As will be thoroughly briefed in La Liberte's forthcoming opposition to the Anti-SLAPP Motion, these issues arise because many anti-SLAPP statutes contain procedures that conflict with the Federal Rules of Civil Procedure. Most pertinent to the matter at hand, section 425.16(g) of California's anti-SLAPP statute provides as follows:

> All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. . . . The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

Here, although Reid has filed her Anti-SLAPP Motion at the pleading stage, she raises factual challenges to La Liberte's allegations by submitting matters outside the pleadings: i.e., three separate affidavits from herself, her counsel, and a retained litigation consultant. Reid simultaneously seeks to hamstring La Liberte into responding to her fact-based Anti-SLAPP

[1] La Liberte conferred with Reid, through their respective counsel, in a good-faith attempt to agree on the limited discovery sought herein, but the parties were unable to compromise.

Motion without the benefit of any discovery. Yet the Federal Rules of Civil Procedure do not permit factual challenges at the motion to dismiss stage and binding Supreme Court precedent states that discovery must be allowed prior to ruling on a fact-based summary judgment motion. Accordingly, La Liberte must be allowed discovery to develop the factual record necessary for this Court's full consideration of the Anti-SLAPP Motion.

Given the requirements of the Federal Rules and the Supreme Court, federal courts – even those few that apply anti-SLAPP statutes in federal courts – do not apply stays of discovery mandated by anti-SLAPP statutes. Rather, in an attempt to salvage the application of anti-SLAPP statutes in federal courts, pursuant to Rule 56(d), those federal courts do not enforce the statutory discovery stays when anti-SLAPP motions raise factual challenges. *See, e.g., Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) ("Because the discovery limiting aspects of § 425.16(f) and (g) collide with the discovery allowing aspects of Rule 56, these aspects . . . cannot apply in federal court"); *Planned Parenthood Fedn. of Am., Inc. v. Ctr. For Med. Progress*, 890 F.3d 828, 833-34 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018) ("In order to prevent the collision of California state procedural rules with federal procedural rules, we will review anti-SLAPP motions to strike under different standards depending on the motion's basis. . . . Requiring a presentation of evidence without accompanying discovery would improperly transform the motion to strike under the anti-SLAPP law into a motion for summary judgment without providing any of the procedural safeguards that have been firmly established by the Federal Rules of Civil Procedure. . . . in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court" upon a fact-based anti-SLAPP motion.). Discovery *must* be allowed.

Although the Second Circuit has not expressly decided the issue, it has taken up a review of an order out of the Southern District of New York and approved of the application of the Rule 56 standard in the same manner as the Ninth Circuit decisions referenced above. *See Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir 2014) (citing *Metabolife* with approval and noting that the district court assessed the pre-hearing discovery motion under Rule 56 rather than Nevada's anti-SLAPP statute). As *Metabolife* noted, "[a]lthough Rule 56(f) facially gives judges the discretion to disallow discovery . . . the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" 264 F.3d at 846 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

Rule 56(d) provides that a nonmovant may show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to its opposition," in which case the court may defer the motion or deny it or allow discovery. The Second Circuit has articulated the Rule 56(d) standard as requiring the movant to show: (1) the nature of the uncompleted discovery, i.e., what facts are sought and how they are to be obtained; (2) how those facts are reasonably expected to create a genuine issue of material fact; (3) what efforts the affiant has made to obtain those facts; and (4) why those efforts were unsuccessful. *See, e.g., Burlington Coat Factory Warehouse Corp. v. Espirit De Corp.*, 769 F.2d 919, 926 (2d Cir. 1985). Moreover, a litany of decisions express the Second Circuit's displeasure with ruling on a summary judgment motion without affording complete discovery. *See, e.g., Sutera v. Schering Corp.*, 73 F.3d 13, 18 (2d Cir. 1995) ("[A] party

opposing a motion for summary judgment must have had the opportunity to discover information that is essential to his opposition to the motion."); *Trebor Sportswear Co. v. Limited Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989) (same); *Schlesigner Inv. P'ship v. Fluor Corp.*, 671 F.2d 739, 743 (2d Cir. 1982) ("[S]ummary judgment should rarely be granted when the plaintiff has not had an opportunity to resort to discovery procedures.").

My enclosed declaration establishes that La Liberte has met the Rule 56(d) standard required in this Circuit. Although La Liberte should be entitled to fulsome discovery, including information possessed by third parties, she seeks only the right to receive responses to no more than five document requests and a one-day deposition of Reid *solely on the issue of actual malice*. Although actual malice may be proven through circumstantial objective evidence, it remains a subjective standard that is intended to peer into the defendant's state of mind. Moreover, Reid has filed challenges to certain of La Liberte's allegations while leaving wholly unaddressed material allegations that will create a genuine issue of material fact. As more fully set forth in the enclosed declaration, La Liberte seeks discovery of information that is reasonably expected to bear on: Reid's deliberate misquoting of her sole source; her preexisting knowledge of facts showing La Liberte's innocence; her purposeful avoidance of facts establishing La Liberte's innocence; her knowledge or lack thereof regarding her sole source and his bias; Reid's knowledge or lack thereof of other social media posts regarding La Liberte; Reid's failure to investigate her claim in the slightest; and Reid's own personal bias, motives, and agenda. In the declaration, the specific facts expected to establish a jury issue on Reid's actual malice are set forth in detail.

While La Liberte also maintains her legal positions that California's anti-SLAPP statute is unavailable to Reid in this Court, and that she is a private figure not required to show actual malice, she is entitled at a minimum to discover facts essential to her opposition and which are within Reid's sole possession.[2] Accordingly, La Liberte requests an order (1) requiring Reid to respond to discovery by way of responding to up to five document requests and sitting for a one-day deposition, (2) setting a ninety-day preliminary discovery period, and (3) allowing La Liberte to supplement her briefing based upon material disclosed in discovery. As an alternative to point three and in the interest of judicial economy and the parties' resources, La Liberte requests that her January 14, 2019, deadline to file her opposition to the Anti-SLAPP Motion be extended to thirty days after the close of the ninety-day discovery period, thereby avoiding an extra round of supplemental briefing.

Respectfully,

G. Taylor Wilson

cc: John Reichman, Esq.

[2] Another unusual issue that arises in these contexts is that the parties are often required to brief an array of issues that may or may not be relevant depending on the court's decision as to whether anti-SLAPP statutes can be applied in federal court, an issue that is compounded when a supplemental post-discovery round of briefing is required.